IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the Interior, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

ADMINISTRATIVE AGENCY PROCEEDINGS:

Page

STATUTES

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Petitioners, Tex-La Electric Cooperative, Inc. ("Tex-La"), and Sam Rayburn Dam Electric Cooperative, Inc. ("Sam Rayburn"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 15, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not officially reported, and is reproduced as Appendix A to this Petition (Appendices are bound separately for the Court's convenience). The opinion of the United States District Court for the District of Columbia Circuit, also unreported, is reproduced in Appendix C. The orders of the Federal Power Commission which were re-

viewed by the district court and the court of appeals are reported at 45 F.P.C. 183 (1971) and 45 F.P.C. 394 (1971), and are reproduced as Appendices D and E to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered May 15, 1978; the court's order denying rehearing was entered June 8, 1978. The jurisdiction of the Supreme Court is invoked under § 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Flood Control Act of 1944 and the Administrative Procedure Act of 1946, as amended, are set forth in Appendix H to this Petition.

QUESTIONS PRESENTED

1. Whether recreation and fish and wildlife costs of a federal hydroelectric project may be recovered from power customers under authority of a federal statute which, by its terms, authorizes only the recovery of power costs.

2. Whether a rate order which violates one statutory standard and fails to evaluate others is "arbitrary, capricious, [and] an abuse of discretion" within the meaning of the Administrative Procedure Act.

3. Whether due process is denied when a ratepayer is precluded from challenging in *any* forum, administrative or judicial, the statutory factual basis on which the administrative power to set rates is conferred—particularly where the agency admits its failure to follow express statutory standards.

STATEMENT OF THE CASE

The Statutory Scheme

These cases involve non-statutory review of rate orders approved by the Federal Power Commission ("FPC") under authority of § 5 of the Flood Control Act of 1944, 58 Stat. 890, as amended, 16 U.S.C. § 825s. That statute authorizes the Secretary of the Interior ("Secretary") to sell power and energy at certain Corps of Engineers projects, at rates proposed by the Secretary and approved by the FPC. Such rates must conform to three statutory standards:

> (1) the rates must "encourage the most widespread use" of the power and energy subject thereto;
>
> (2) the rates must be "the lowest possible . . . consistent sound business principles";
>
> (3) the rates must "[have] regard to the recovery . . . of the cost of producing and transmitting such electric energy . . . within a reasonable period of years."

There is no provision in 16 U.S.C. § 825s for a hearing of any kind, or for notice and comment procedure.

Neither the FPC nor the Department of Interior has published the procedures by which it conducts its rate-making functions under 16 U.S.C. § 825s.

The above-described statutory scheme is implemented by contracts between customers and the various marketing agencies of the Department of the Interior.

The Disputed Rate Increases

Petitioners Tex-La and Sam Rayburn purchase power and energy under separate contracts[1] with the Southwestern Power Administration ("SPA"), a marketing agency of the Department of the Interior. Tex-La purchases the entire output of the Narrows Dam Project in Arkansas, and Sam Rayburn purchases the entire output of the Sam Rayburn Dam Project in Texas. Both projects are multiple purpose projects, constructed and operated by the Corps of Engineers.

The contracts provided for initial rates which were to remain in effect for five years. These initial rates were based on the estimated total costs of producing the power sold, including construction and operating costs allocable to the projects' power function, and on the so-called "repayment period" for each project—the period over which the original investment allocable to power was to be recovered.[2]

In 1970, following the appointment of a new Administrator of SPA, that agency submitted to the FPC

[1] The Tex-La/SPA contract was entered into on May 11, 1961, for a term of 25 years; the Sam Rayburn/SPA contract was entered into on February 13, 1964, for a term of 20 years.

[2] The Sam Rayburn contract provided for an initial rate of $950,004 per year, based on the estimated costs allocable to power and a repayment period of 50 years. The Tex-La contract provided for a rate of $367,992 per year, based on the estimated costs allocable to power and a repayment period of 96 years. The 96-year repayment period was proposed by SPA and approved by the FPC because the Narrows Dam Project had incurred a deficit of $753,671 prior to the time Tex-La contracted for the project's output. This deficit resulted from SPA's sales of the Narrows output to the Southwestern Electric Power Company ("SWEPCO") between 1951 and 1961.

proposed rate increases for the Narrows and Sam Rayburn projects. The alleged justification for these proposed rate increases was that the costs of producing power at the two projects had increased.

The only "facts" filed by SPA in support of the proposed rate increases were the alleged cost figures shown in the "repayment studies"[3] prepared by SPA for the Narrows and Sam Rayburn projects. (The relevant parts of these studies are reproduced in Appendices F and G of this Petition.) These repayment studies, unlike the cost of service studies required by the FPC for all ratemaking under the Federal Power Act and the Natural Gas Act, simply show summary costs for each year of the repayment period, broken down into four very broad categories: (1) investment, (2) Corps of Engineers operating expense, (3) SPA operating expense, and (4) interest. These is no explanation in the repayment studies or elsewhere in the record of what specific expenditures, actual or anticipated, constitute these alleged investments, operating expenses and interest expenses, or why such expenditures are properly allocable to power rather than to some other project purpose.

Petitioners attempted to challenge the factual basis of the proposed rates at the agency level but were denied any meaningful opportunity to do so. Because the FPC has no regulations for ratemaking under 16 U.S.C. § 825s, Petitioners could not engage in any kind

[3] Repayment studies were developed for use in financial reporting, not for ratemaking purposes; even as used for reporting, they have recently come under heavy criticism by the General Accounting Office. Samuelson, "Average Rate and Repayment Studies for Federal Power Systems—A Reporting Enigma," GAO Review 40 (Fall 1975).

of discovery with respect to the costs alleged in the repayment studies.[4] Therefore, although they had no statutory right to a hearing, Petitioners requested the FPC to convene hearings as an exercise of discretion, in order to determine whether the summary costs alleged in the repayment studies were in fact the costs of producing power at the two projects. J.A. 172, 935.[5]

When their requests were denied, Petitioners filed written comments on the proposed rates. Sam Rayburn questioned (1) the alleged investment costs, (2) the alleged Corps operating costs, (3) the alleged SPA operating costs, (4) the inclusion of future replacement costs in the proposed rate, (5) inconsistencies between the cost figures used in the repayment studies and the cost figures shown in other SPA documents for the Sam Rayburn project, and (6) the substantial disparity between the proposed rate to Sam Rayburn and the rates charged to other SPA customers. In addition, Sam Rayburn submitted an alternative set of figures to the FPC which demonstrated that no rate increase was necessary. J.A. 1002-07; 1020-26. Tex-La questioned (1) alleged investment costs, (2) alleged Corps operating costs, (3) the effect of remote control operations on operating costs, and (4) the inclusion in the proposed rate of a $753,671 deficit which SPA had

[4] By way of contrast, it may be noted that the FPC's regulations for ratemaking under the Federal Power Act and the Natural Gas Act provide for subpoenas and data requests, 18 C.F.R. § 1.23, and depositions, 18 C.F.R. § 1.24.

[5] Citations to the joint appendix filed in the Court of Appeals are designated "J.A." Citations to Appendix 2 to Defendants' Memorandum in Support of Their Cross-Motion for Summary Judgment are designated "Def. App. 2." Citations to the transcript of the oral argument in the Court of Appeals are designated "Tr. Or. Arg."

incurred as a result of sales of Narrows Dam power to the Southwestern Electric Power Company during the period 1951-1961, before SPA entered into the present contract with Tex-La.[6] J.A. 170-72.

After receiving Petitioners' comments, the FPC twice sent inquiries to the Corps of Engineers concerning the costs alleged by SPA because some 93 percent of these costs were supposedly incurred by the Corps; the Corps never responded. J.A. 949, 1008, 1059. Moreover, SPA subsequently admitted that it usually does not verify the Corps of Engineers costs, including investment costs, shown in repayment studies. Def. App. 2 at 365-66.

In orders[7] issued January 22, 1971, and March 5, 1971, the FPC approved the rate increases for Narrows Dam and Sam Rayburn Dam, respectively.[8] The Commission's orders contained no mention or evaluation of either the "lowest possible rates . . . consistent with sound business principles" standard or the "most widespread use" standard. And, though the orders paid lip-service to the "recovery of cost standard," they did not respond to a single one of the comments listed above.

Having been denied a hearing and meaningful notice and comment procedure at the agency level, Petitioners sought to try the disputed facts on which the rate increases were premised in the district court in suits to

[6] Inclusion of the $753,671 deficit prior to the end of the repayment period was contrary to express representations made by the SPA Administrator to Tex-La during the negotiations of the SPA/Tex-La contract. Affidavit of Douglas G. Wright, Administrator of SPA 1943-69, Def. App. 2 at 834.

[7] The FPC approved rates of $465,000 per year for Narrows Dam and $1,030,000 per year for Sam Rayburn Dam.

enjoin enforcement of the rate increases. These suits for declaratory and injunctive relief were filed in 1971 and later consolidated.

Petitioners commenced discovery in the district court with two extensive sets of interrogatories. Incredibly, the Respondent members of SPA and the FPC, the agencies having statutory responsibility for proposing and approving rates under 16 U.S.C. § 825s, could not answer many of the interrogatories concerning the alleged costs; these interrogatories were forwarded to, and answered by, the Corps of Engineers, an agency having no ratemaking authority under 16 U.S.C. § 825s. The Corps' answers, which were adopted by Respondents, admit that the disputed Narrows Dam rate would recover recreation and fish and wildlife costs. (see *infra* at 13).

Repeated efforts by the Respondents to have the suits dismissed on procedural grounds consumed approximately three years.[8] Petitioners then proceeded to move for summary judgment on the grounds that the procedures used by the FPC to approve SPA's rate proposals violated §§ 552(a)(1) and 706(2)(A) of the Administrative Procedure Act and denied Petitioners due process of law. The relevant facts on which Petitioners' motion was based were (1) the content of the orders in question, which failed to evaluate two of the three standards of 16 U.S.C. § 825s, (2) the content of the agency record, which contained no facts other than the SPA repayment studies to

[8] The motion of members of the FPC to be dropped as parties defendant was filed August 13, 1971, and denied June 20, 1972; the defendants' motion to dismiss the complaint was filed September 15, 1971, and denied June 20, 1972; defendants' motion for judgment on the pleadings was filed April 2, 1973, and denied May 6, 1974.

support an ultimate finding that the third standard of 16 U.S.C. § 825s was satisfied, and (3) the undisputed fact that neither the Secretary nor SPA had published the procedures by which rates are proposed under 16 U.S.C. § 825s, and the FPC had not published the procedures by which it approves such rates.[9] The disputed costs on which the rate increases were based were not relevant to Petitioners' motion for summary judgment, except to the extent that they emphasized the procedural deficiencies complained of.

Shortly after Petitioners filed their motion for summary judgment, SPA prepared new repayment studies for the Narrows and Sam Rayburn projects. These studies purported to show that actual costs between 1970 and 1975 exceeded the estimated costs shown in the repayment studies which had been used to justify the 1971 rate increases. As with the earlier studies, however, there was no explanation of how the alleged costs, either "actual" or "estimated," were determined. There was no indication of what specific expenditures, either historic or anticipated, were associated with the alleged costs, and there was no explanation of why such expenditures are properly allocable to power. In other words, all of the deficiencies in the repayment studies which gave rise to this suit were repeated in the later studies.

[9] Failure to publish the procedures by which rates for federal hydropower are proposed and approved under the reclamation laws has been held to be in violation of § 552(a)(1) of the Administrative Procedure Act. Northern California Power Agency v. Morton, et al., 396 F.Supp. 1187 (D.D.C. 1975), aff'd mem. sub nom., Northern California Power Agency v. Kleppe, et al., 439 F.2d 243 (D.C. Cir. 1976).

After preparing the new repayment studies, Respondents filed a cross-motion for summary judgment in which they argued that the alleged costs on which the disputed rates were based were in fact too low. As "evidence" that these alleged costs were too low, Respondents submitted the results of *new* repayment studies, supported by new affidavits. These affidavits, which simply testified as to the accuracy of the repayment studies, were prepared specifically for the district court litigation approximately five years after the rate filings in question were prepared.

In opposition to Respondents' cross-motion for summary judgment, Petitioners maintained that the alleged costs on which the rate increases were based were material facts as to which a genuine dispute existed. Petitioners submitted the affidavit of an experienced expert power witness who testified that neither the repayment studies nor Respondents' new litigation affidavits "provided engineering, economic and cost of service data to justify the increases of revenue to be collected from Tex-La and Sam Rayburn." J.A. 454. Petitioners' expert witness effectively illustrated the inadequacy of the repayment studies relied on by Respondents to justify rates with the following example:

> "As a simple example, the rate and repayment study for Sam Rayburn Dam estimates that a 'replacement' facility costing $401,600 will be installed in the year 2002. In order to determine the validity of that forecast, SPA must reveal *what* the facility is, *why* it must be installed, and *why* it will cost $401,600 in the year 2002. That information has not been provided by SPA." J.A. 455.

In an order dated March 31, 1977, the district court granted summary judgment in favor of Respondents.

The district court's judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit in an order of May 15, 1978.

REASONS FOR ALLOWANCE OF THE WRIT

Title 16 U.S.C. § 825s controls the marketing of hydroelectric power and energy at 75 federal projects located in 15 states.[10] These projects have an aggregate capacity of some 18.4 million kilowatts.[11]

Although SPA has marketed power under authority of 16 U.S.C. § 825s since 1944, the ratemaking standards of that statute and similar statutes[12] have never before been tested in this Court. Nor has the scope of review for ratemaking under such statutes ever been judicially defined. The present suit thus presents to the Court a case of first impression.

The need for review of this case is further underscored by the fact that SPA has already begun to use the Court of Appeals decision as precedent in a major rate case involving 59 customers and 21 projects. *See* U.S. Department of the Interior, Southwestern Power Administration, Transcript of Proceedings held July 20, 1978, in the matter of Public Information Forum, at 138-39. Thus, the Court of Appeals' decision, if allowed to stand, will have a major impact on the marketing of federal hydroelectric power.

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[10] *See* Bonneville Power Administration, 1976 Annual Report 21 (1977); Southeastern Power Administration, 1976 Annual Report 3 (1977); Southwestern Power Administration, 1976 Annual Report 20 (1977).

[11] *Id.*

[12] *E.g.*, Bonneville Project Act, 16 U.S.C. § 838g; Columbia River Transmission System Act, § 9, 16 U.S.C. § 838g; Fort Peck Project Act, 16 U.S.C. § 833d; Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831h-1.

I. THE COURT OF APPEALS ERRED IN AFFIRMING A RATE ORDER WHICH RESPONDENTS HAVE ADMITTED RECOVERS RECREATION COSTS AND FISH AND WILDLIFE COSTS IN VIOLATION OF THE COST RECOVERY STANDARD OF 16 U.S.C. § 825s.

Agency action which is not in accord with the agency's enabling legislation is invalid. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-89 (1942); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 449, 504-05 (1935); *Florida* v. *United States*, 282 U.S. 194, 211-15 (1931). Thus, agency ratemaking must comply with the standards prescribed by Congress in the statute authorizing the ratemaking. As this Court said in the first *Morgan* case, which involved ratemaking by the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C. §§ 181 *et seq.*:

> "The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan* v. *United States*, 298 U.S. 468, 479 (1936).

Similarly, the Secretary of the Interior and the FPC, in making rates under authority of 16 U.S.C. § 825s, must "make them in accordance with the standards and under the limitations which Congress has prescribed." Those "standards and limitations" are that the rates shall (1) "encourage the most widespread use" of the power and energy subject thereto, (2) be "the lowest possible rates to consumers consistent with sound business principles," and (3) have "regard to the recovery . . . of the cost of producing and transmitting such electric energy." The only standard which is evaluated in the orders and in the record is

the "recovery of cost" standard, and Respondents have admitted that they did not adhere to that standard in approving the disputed rate increase for Narrows Dam.

By its express terms, 16 U.S.C. § 825s limits recoverable costs to "the cost of producing and transmitting such electric energy." This limitation is consistent with the concomitant standard of 16 U.S.C. § 825s which requires that rates be "the lowest possible rates to consumers consistent with sound business principles."

Yet Respondents have admitted that the disputed Narrows Dam rate would recover costs other than the cost of producing and transmitting electric energy. In their second set of interrogatories Petitioners asked:

> "What percentage of the operating and maintenance costs assigned to power is actually used for recreation and fish and wildlife at the Narrows Dam project?"

Neither SPA nor the FPC could answer this question, so it was forwarded to the Corps of Engineers. The Corps answered:

> "On a cumulative basis from FY 65 to FY 73, 4.49% of Operating and Maintenance costs assigned to Power was actually used for Recreation and Fish and Wildlife on the Narrows Dam Project."

The "Operating and Maintenance costs assigned to power" referred to in the Corps' answer are the costs shown in column 4 of the repayment study for Narrows Dam (Appendix G, *infra*). These costs would be recovered from Petitioner Tex-La under the rate order affirmed by the Court of Appeals.

Presumably, if Congress had intended that power customers pay non-power costs, notwithstanding the plain language of the "recovery of cost" standard and the "lowest possible rates . . . consistent with sound business principles" standard, Congress would have provided expressly therefor.[13] The uniform policy of Congress has been to make recreation costs and fish and wildlife costs non-reimbursible. *See, e.g.,* Canadian River Reclamation Project, § 2, 43 U.S.C. § 600d; Arbuckle Project Act, § 2, 43 U.S.C. § 616*l*; Mann Creek Project Act, § 3, 43 U.S.C. § 616i; Fryingpan-Arkansas Project Act, § 4, 43 U.S.C. § 616c; Southern Navigation Project, § 2, 43 U.S.C. § 616hhh.

But neither 16 U.S.C. § 825s nor any other provision in the Flood Control Act of 1944 authorizes the recovery of non-power costs from power customers. Section 4, which is codified at 16 U.S.C. § 460d, provides for the construction, maintenance, and operation of recreation and fish and wildlife facilities. Section 4 also provides that "all moneys recovered by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts." However, section 4 does not authorize recovery of the costs of maintaining recreation and fish and wildlife facilities from power customers.

Nor is there any provision in the general legislation dealing with recreation and fish and wildlife which would authorize recovery of recreation costs or fish and

[13] With respect to the Bonneville Project Act and the Reclamation Project Act of 1939, both of which contain recovery of cost standards similar to that of 16 U.S.C. § 825s, Congress has provided expressly for the use of power revenues to pay irrigation costs.

wildlife costs by rates set under authority of 16 U.S.C. § 825s.[14]

The FPC exceeded its statutory authority in approving a rate which would recover recreation and fish and wildlife costs, in violation of the cost recovery standard prescribed by Congress in 16 U.S.C. § 825s. The FPC's order approving the rate was therefore "arbitrary, capricious [and] an abuse of discretion" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and should have been declared unlawful and set aside accordingly.

II. THE COURT OF APPEALS ERRED IN AFFIRMING RATE ORDERS WITHOUT REQUIRING AN EVALUATION OF EITHER THE "MOST WIDESPREAD USE" STANDARD OR THE "LOWEST POSSIBLE RATES . . . CONSISTENT WITH SOUND BUSINESS PRINCIPLES" STANDARD OF 16 U.S.C. § 825s

An agency's order may be affirmed only on the grounds articulated by the agency in the order itself. *FPC* v. *Texaco,* 417 U.S. 380, 398 (1974); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69 (1962); *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

The FPC orders approving the disputed rate increases for the Narrows and Sam Rayburn projects are reproduced as Appendices D and E of this Petition. Examination of these orders reveals that there is no evaluation of either the "most widespread use" standard or the "lowest possible rates . . . consistent with sound business principles" standard. Nor is there any evaluation of these standards in the underlying record;

[14] *E.g.,* Federal Water Project Recreation Act, 16 U.S.C. § 460 l-12, *et seq.*; Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460l-4, *et seq.*; Water Resources Development Act of 1974, Pub. L. No. 93-251, 88 Stat. 12.

the repayment studies, which constitute the entire factual basis upon which the FPC approved the rate increases, concern only the "recovery of cost" standard, which Respondents admit they did not follow.

The FPC has repeatedly acknowledged that both the "most widespread use" standard and the "lowest possible rates . . . consistent with sound business principles" standard apply to ratemaking under 16 U.S.C. § 825s. *E.g., U.S. Dept. of the Interior, Bonneville Power Administration,* 53 F.P.C. ——, 40 Fed. Reg. 40205 (1975); *U.S. Dept. of the Interior, Southeastern Power Administration* 53 F.P.C. ——, 40 Fed. Reg. 29127 (1975); *U.S. Department of the Interior, Bonneville Power Administration,* 34 F.P.C. 1462, 1465 (1965).

This Court has held that agency orders which do not contain an evaluation of all relevant standards are invalid. In *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957), the Court set aside an order issued by the Interstate Commerce Commission under authority of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940 and the National Transportation Policy, 49 U.S.C. §§ 1 *et seq.* The order gave effect to the "public convenience and necessity" standard of the Motor Carrier Act. *See A. W. Schaffer Extention-Granite,* 63 M.C.C. 247, 257-58 (1955). This Court nevertheless held the order invalid because it failed to evaluate the "inherent advantages" standard of the National Transportation Policy:

> "[W]e find at the outset that there has been no evaluation made of the 'inherent advantages' of the motor service proposed by the applicant. [The National Transportation Policy] requires the Commission to administer the Act so as to 'recognize and preserve the inherent advantages' of each mode of transportation. . . .
>
> "Since the Commission has failed to evaluate the benefits [*i.e.,* the "inherent advantages"] that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." 355 U.S. at 89, 92.

The Court applied the same reasoning in a rulemaking context in *FPC* v. *Texaco,* 417 U.S. 380 (1974). There, the Court held invalid an FPC rule issued under authority of the National Gas Act, 15 U.S.C. §§ 717 *et seq.,* because the rule did not show compliance with the "just and reasonable" standard of the National Gas Act:

> "[The order] falls short of that standard of clarity that administrative orders must exhibit. The Commission was bound to exercise its discretion within the limits of the standards expressed by the Act; and 'for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it."' " 417 U.S. at 395-96.

The requirement that agency orders and rules evaluate relevant standards is not limited to cases where the enabling legislation requires formal findings of fact. *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 408-09, 419-20 (1971).

In the case now before this Court, the orders in question fail to show that Respondents exercised their discretion within the limits prescribed by Congress in the "most widespread use" standard and the "lowest possible rates . . . consistent with sound business principles" standard. Nowhere in the orders or in the underlying agency record is either of these standards mentioned or evaluated. The orders should therefore be declared unlawful and set aside as required by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

III. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS WERE NOT ENTITLED TO TRY THE DISPUTED COSTS IN ANY FORUM

Petitioners had no meaningful opportunity to challenge the disputed costs at the agency level, by trial or otherwise. The FPC did not publish the procedures used to approve the rates, so there was no "reasonably complete code of procedures set out in advance by which actions can be guided and strategies planned." *Northern California Power Agency* v. *Morton et al.*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd mem. sub nom., Northern California Power Agency* v. *Kleppe, et al.* 539, F.2d 243 (D.C. Cir. 1976). Petitioners were denied a hearing on the disputed costs, and their opportunity to submit written comments was rendered meaningless by the agency's failure to respond to the significant points raised. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 54 L.Ed.2d 89 (1977); *Rodway* v. *Department of Agriculture*, 517 F.2d 804, 817 (D.C. Cir. 1975); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973). In effect, Petitioners were presented with the rate increases on a "take it or leave it" basis.

The particular need for a trial of the costs disputed in the present case is illustrated by the following comment of Judge Wilkey, made during oral argument:

> "Well, take this item which is referred to in oral argument of [Petitioners'] Counsel, in Column 17 . . . .
>
> "Here's an item of $401,600 projected for expense in—I guess investment—yes, investment, in the year 2002, and it's supposed to be for power purposes. That's why in that column. . . .
>
> "Well, I'd like to be told here whether this is a fishing lodge-motel, or its the bearings and bushings that go into the generator, that need to be replaced there. If I were told that simple fact one way or another, I might have an idea as to whether this is a proper expense for power investment.
>
> "And I suppose that's what the Petitioners were asking for." Tr. Or. Arg. 33-35.

The Court of Appeals held that Petitioners were not entitled to a trial of the disputed costs on which the rates were premised, either at the agency level or in the district court. This holding conflicts with the intent of Congress as evidenced by the legislative history of the Administrative Procedure Act, and is violative of fundamental notions of due process.

Section 553(c) of the Administrative Procedure Act provides that the hearing requirements of §§ 556 and 557 shall apply "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." There is no such requirement in 16 U.S.C. § 825s.

However, in enacting § 553(c), Congress intended that, in cases where the statute does not provide for the rule to be made "on the record after opportunity for

an agency hearing," disputed facts relevant to the validity of the rule would be tried in the district court. Thus, § 706 of the Administrative Procedure Act provides that "the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

The Senate and House Reports and statements by the Administrative Procedure Act draftsmen show Congress intended that facts relevant to the validity of an agency rule would be tried in the district court in cases where the agency is not given the trial of fact function. For example, the Senate Report states:

> "[Section 706(2)(F)] would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. . . . Where a court enforces or applies an administrative rule, the party to whom it is applied may offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule. Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid, he may show the facts upon which he predicates such invalidity." S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945).

The House Report added the following language:

> "In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45-46 (1946).

Professor McFarland, one of the drafters of the Administrative Procedure Act and former chairman of the Administrative Law Section of the American Bar Association, has explained the allocation of the trial of fact function under the APA as follows:

> "But where the administrative agency is not given the trial function, where are the facts to be tried out and record made? In the courts, of course, because where there are relevant fact issues they must be established somewhere. The assumption is that, unless Congress allocates the trial-of-fact function to an administrative agency by providing for agency hearings (or the same result is reached by constitutional implication), then the trial function falls to the courts under their general jurisdiction. The APA recognizes the situation by (a) providing for judicial review on the administrative record 'of an agency hearing provided by statute' or (b) otherwise requiring a determination whether the challenged administrative action is 'unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.' 5 USC 706(2)(E) and (F). But to what 'extent' are facts subject to court determination de novo? They must be relevant to the legal issue posed under the organic legislation involved, of course. . . . Presumably they must also be of such a nature that they would foreclose the administrative exercise of discretion because, if the facts establish that the agency could and did rule as it did within

its authority, it would not lie with the reviewing court to deny the agency the discretion given it under the organic legislation." C. McFarland, CASES AND MATERIALS ON ADMINISTRATIVE LAW 421 (1975).

Similarly, Professor Nathanson writes:

> "[A]n underlying assumption of the APA draftsmen was that any factual issues which became pertinent in a challenge to the validity of a section 553 rule would be resolved in the first instance in judicial proceedings—either in enforcement proceedings or in suits to enjoin enforcement...
>
> "This is also consistent with the judicial review provisions of the APA. Section 706(2)(F) provides: 'the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.'" Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statute,* 75 Col. L. Rev. 721, 755 (1975) (hereinafter "Nathanson").

And Professor Davis, in the second (1978) edition of his treatise, states:

> "A requirement of [f]actual support for rules is quite different from a requirement of findings...
>
> "In 1946 the assumption was that the factual ingredient of rulemaking could be fought out in a reviewing court, and that the court would make a de novo determination of the facts [citing the legislative history of the Administrative Procedure Act]." 1 K. Davis, ADMINISTRATIVE LAW TREATISE 506-07 (2d ed. 1978).

The requirement that disputed facts be tried in *some* forum, albeit not necessarily at the agency level, is rooted in due process. *See Southern Railway Co.* v. *Virginia,* 290 U.S. 190 (1933). Thus, Professor Nathanson writes:

> "It must be equally apparent that Congress may not insulate an administrative regulation from such a challenge [i.e., a trial of disputed facts] any more than it could its own legislation. Consequently, a fair opportunity to develop in some forum—either administrative or judicial—the underlying facts essential to the resolution of the controversy may not be foreclosed. For this purpose, it is quite immaterial whether the challenge to the regulation is formulated in constitutional terms or simply as a failure to comply with statutory standards; in either case, the due process right to challenge fairly the validity of a regulation . . . is compelling." Nathanson at 757.

The due process derivation of the right to try disputed facts of course assumes the existence of an interest which (1) is entitled to due process protection and (2) would be adversely affected by the agency action. Petitioners have such an interest at stake in this proceeding. Petitioners have both a statutory right and a contractual right to rates which conform to the standards of 16 U.S.C. § 825s. These rights are entitled to due process protection. *See Lynch* v. *United States,* 292 U.S. 571, 579 (1939); *United States* v. *Northern Pacific Railway Co.,* 256 U.S. 51, 64, 67 (1921); *United States* v. *Central Pacific Railroad Co.,* 118 U.S. 235, 238 (1886).

The requirement of a trial de novo to resolve disputed facts which were not tried at the agency level and which are relevant to the validity of agency action

also finds support in the case law. In *Jordan* v. *American Eagle Fire Insurance Co.,* 169 F.2d 281 (D.C. Cir. 1948), a case decided shortly after the enactment of the Administrative Procedure Act, Judge Prettyman wrote:

> "It is also established that where the requisite due process hearing is not included in the legislative or administrative process, it may be adequately supplied by a judicial proceeding in which new evidence may be supplied and full opportunity afforded for exploration of the bases of the disputed order. . . . Porter v. Investors Syndicate, 1932, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226; Wadley So. Ry. Co. v. Georgia, 1915, 235 U.S. 651, 661, 35 S.Ct. 214, 59 L.Ed. 405, 411, and cases cited. See Mr. Justice Brandeis, dissenting in Ohio Valley Water Co. v. Ben Avon Borough 1920, 253 U.S. 287, 292, 40 S.Ct. 527, 64 L.Ed. 908, 915; and Mr. Chief Justice Hughes, Mr. Justice Stone and Mr. Justice Cardozo, dissenting in Southern Ry. Co. v. Virginia, 1933, 290 U.S. 190, 199, 54 S.Ct. 148, 78 L.Ed. 260. See also reference in Ohio Bell Tel. Co. v. Public Utilities Commission, 1937, 301 U.S. 292, 303, 57 S.Ct. 724, 81 L.Ed. 1093." *Id.* at 289.

Two more recent decisions by this Court appear to require a different result, however. In *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415 (1971), the Court held that trial de novo was inappropriate to review a decision of the Secretary of Transportation under § 4(f) of the Transportation Act of 1966, as amended, 49 U.S.C. § 1653(f), and § 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, authorizing the use of federal funds to construct a highway. And in *Camp* v. *Pitts,* 411 U.S. 138, 141-42 (1973), the Court held that trial de novo was inappropriate to review a decision of the Comptroller of the

Currency under the National Bank Act, 12 U.S.C. § 27, not to issue a certificate authorizing construction of a new bank. In *Overton Park,* the Court said:

> "De novo review of whether the Secretary's decision was 'unwarranted by the facts' is authorized by § 706(2)(F) in only two circumstances. First, such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." 401 U.S. 415.

Curiously, the only authority cited in support of the above-quoted statement in *Overton Park* was H.R. Rep. No. 1980, 401 U.S. 415, and the only authority cited in *Camp* was *Overton Park,* 411 U.S. 141.

Yet a careful reading of H.R. Rep. No. 1980 indicates that Congress intended a trial de novo in situations other than those specified in *Overton Park.* For example, H.R. Rep. No. 1980 provides:

> "The sixth category [*i.e.,* 5 U.S.C. § 706(2)(F)], respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in *any* case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45 (1946). (Emphasis added.)

The House Report continues:

> "It would also require the judicial determination of facts in connection with *rule making or any other conceivable form of agency action to* the extent that the facts were relevant to *any* pertinent issues of law presented." *Id.* (Emphasis added.)

There is no limitation in the above statement to enforcement proceedings. The reference to enforcement procedings appears in the next sentence:

> "*For example,* statutes providing for 'reparation orders,' in which agencies determine damages and award money judgments, usually state that the money orders issued are merely prima facie evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending." *Id.* (Emphasis added.)

Thus, the reference to enforcement proceedings is expressly by way of example only. And in the very next sentence, the House Report says:

> "*In other cases,* the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review." *Id.* (Emphasis added.)

Again, there is no limitation to enforcement proceedings. The House Report next gives three examples of "other cases" in which trial de novo would be appropriate:

> "[1] Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in the Tax Court or the United States district courts. [2] Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be. [3] Where a court *enforces or applies* an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention

> that he is not subject to the terms of the rule." (Emphasis added.)

Here, the reference is not to enforcement proceedings but to cases where a court "enforces or applies" a rule. A court may enforce or apply a rule in suits for declaratory and injunctive relief, such as in the present case. Thus, the phrase "enforces or applies" does not limit the example to enforcement proceedings.

The House Report next gives an example of a case where a court "enforces or applies" a rule, which further indicates that such cases are not limited to enforcement proceedings:

> "Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity." *Id.*

Here, the reference is to "judicial proceedings," not "enforcement proceedings." Moreover, the term "affected party" would include a plaintiff in a suit to enjoin enforcement of an agency rule. *See* Administrative Procedure Act, 5 U.S.C. § 702; S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946).

Finally, after the above-quoted examples, the House Report summarizes the cases in which trial de novo is appropriate:

> "In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant ques-

> tion of law must be tried and determined de novo by the reviewing court *respecting either the validity or application* of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court." H.R. Rep. No. 1980, 79th Cong., 1st Sess. 45-46 (1946). (Emphasis added.)

Unlike the previously mentioned examples of cases where trial de novo is appropriate, which are illustrative only, the above-quoted statement articulates the general rule of law with respect to trial de novo; it thus embraces all of the examples expressly mentioned in the House Report, and other examples not mentioned. This statement contains no limitation, express or implied, to enforcement proceedings. To the contrary, the phrase "either the validity or application of such rule" indicates the applicability of 5 U.S.C. § 706(2)(F) to injunctive and declaratory proceedings. This conclusion finds support in the House Report's analysis of § 703 of the Administrative Procedure Act, which provides for the forum and venue of judicial review proceedings. The House Report states:

> "Declaratory judgment procedure, for example, may be operative before statutory forms of review are available *and may be utilized to determine the validity or applications of any agency action." Id.* at 42. (Emphasis added.)

Thus, declaratory judgment procedure can be used to determine "the validity or application of any agency action." And, where a rule is not required by statute to be made on the record after opportunity for an agency hearing, "the facts pertinent to any relevant question

of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule." It necessarily follows that trial de novo of facts pertinent to the validity of a rule is not limited to enforcement proceedings, but is appropriate in suits for declaratory and injunctive relief. Thus, Professor Nathanson has stated that trial de novo of facts pertinent to the validity of an agency rule would be tried de novo "either in enforcement proceedings or in suits to enjoin enforcement." Nathanson at 755.

Indeed, there appears to be little logical basis for distinguishing between enforcement proceedings and suits to enjoin enforcement. If Petitioners had not brought suits to enjoin the enforcement of the 1971 rate orders, and had simply withheld payment, Respondents would no doubt have initiated enforcement proceedings to compel payment. Why is a trial of the disputed facts appropriate in the latter case, but not the former?

Both *Overton Park* and *Camp* may be distinguished from the present case on technical grounds. Neither case involved the scope of review for informal rulemaking proceedings, as does the present case. And in *Overton Park* and *Camp* the critical procedural deficiency was the lack of adequate reasons to support the agency action; in neither opinion did the Court note the existence of specific issues of adjudicatory fact which the plaintiffs claimed were pertinent to the validity of the agency action in question. However, to the extent that the Court feels constrained to apply its holdings in *Overton Park* and *Camp* to the present case, we respectfully urge the Court to reconsider

those holdings in view of the specific legislative history of the Administrative Procedure Act set forth above.

This case does not involve the "promulgating of policy-type rules or standards," or "across-the board" rate increases which are applicable to all customers. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245-46 (1973). Nor is it a case which involves "rulemaking procedures in their most pristine sense." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, —— U.S. ——, ——, 55 L.Ed 2d 460, 467 (1978). The disputed facts are "adjudicative" rather than "legislative," 1 K. Davis, ADMINISTRATIVE LAW TREATISE 412-13 (1958), and are relevant to the legality of the agency action challenged by Petitioners.

In enacting 16 U.S.C. § 825s, Congress could have provided for the Secretary to dispose of power at whatever rates the market would bear, in which case the costs of producing the power would not be pertinent to the validity of the rates. But the purpose of 16 U.S.C. § 825s was to provide rural areas with low cost power,[15] and Congress accordingly limited rates for such power to the cost of producing it. Consequently, the costs of producing power are facts relevant to the validity of rates approved by the FPC under authority of 16 U.S.C. § 825s. Moreover, they are facts which foreclose the exercise of agency discretion. Therefore, if these costs are disputed in a suit to enjoin enforcement of rates approved by the FPC, they must be tried in the reviewing court, because Congress has not provided for a trial at the agency level.

The Court of Appeals' holding that Petitioners were not entitled to try the alleged costs was apparently

[15] *See, e.g.*, 97 Cong. Rec. 10208 (1951).

premised on a conclusion that Petitioners had not established a triable issue of fact. The court's opinion says:

> "[A]ppellants disputed the cost figures upon which the rate increases were premised. However, no *specific* factual dispute was advanced; rather appellants contested the accuracy of the cost figures and called for their verification. We believe that neither the Secretary nor the Commission was obliged to make a second assessment of each and every cost figure derived by the Corps of Engineers in the R & R studies."

The court's conclusion would require that, to create a specific factual issue concerning costs alleged by the Secretary, customers must put in evidence their own version of the particular costs in question. This is impossible, because customers do not have access to the data necessary to determine such costs. The cost data is "particularly within the knowledge" of the Secretary. *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 456, at 615, 643 (1973). The problem was identified by Judge Wilkey at oral argument, when he asked Respondent's counsel:

> "But isn't the problem of the Petitioner here that they couldn't get hold of the facts on which to file affidavits and to make squarely an issue of facts, because they got no information as to what was behind, say, this sheet of figures, and others in the record," Tr. Or. Arg. 29.

Petitioners did everything possible under the circumstances to place the costs in issue. They submitted interrogatories which established that the disputed operation and maintenance costs included non-power costs, in violation of the statute. They put in evidence the

affidavit of an expert power witness who testified that the repayment studies and litigation affidavits relied on by Respondents did not identify the costs which the rates would recover.

Considering that SPA had the burden of proof with respect to the costs in question at the FPC level,[16] Petitioners' interrogatories and affidavit were more than sufficient to create a issue of fact with respect to those costs in the district court. Indeed, it is difficult to imagine any customer doing more under the circumstances. If Petitioners' acts were not sufficient to create a triable issue of fact, costs alleged by the Secretary in ratemaking proceedings under 16 U.S.C. § 825s are, for all practical purposes, immune from challenge by customers, even where, as here, the order approving the rates disregards or fails to evaluate standards mandated by Congress. In such case, rates could be set by administrative fiat.

CONCLUSION

We ask that the Court grant certiorari because of the importance of the issues in this case to the sound administration of the many federal power projects which are controlled by 16 U.S.C. § 825s and similar statutes.

[16] *See, e.g.*, U.S. Dept. of the Interior, Southeastern Power Administration, 53 F.P.C. ——, 40 Fed. Reg. 29127 (1975).

These issues have not been, but should be, decided by this Court.

Respectfully submitted,

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September 6, 1978

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 1978, I caused to be mailed a copy of the foregoing Petition for Certiorari to each of the following: (1) the Solicitor General of the United States; (2) Bruce G. Forrest, Esquire, Attorney for Cecil D. Andrus, Peter C. King, and intervenor, the United States of America, Department of Justice, Washington, D.C. 20530; and (3) Steven A. Taube, Esquire, Attorney for Respondent members of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

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